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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,

v.

SECATORE'S, INC.,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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The respondent, Secatore's, Inc., opposes the petition filed by Esso Standard Oil Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on May 2, 1957, and prays that the petition be dismissed and certiorari denied.

Opinions Below.

The opinions of the District Court and of the Court of Appeals appear as indicated in the petition filed by Esso Standard Oil Company herein (Petition, p. 1).

The Question Presented.

Where the trial court has found that two parties are in substantial competition, one with another, in the sale of gasoline to ultimate consumers, and the intermediate appellate court has affirmed that finding, should this Court grant certiorari upon the petition of one of those parties who seeks thereby to compel the other, a non-signer, to observe the terms of its price maintenance contracts?

Statute Involved.

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. § 45(a): See Petition, Appendix C, pp. 34-36, for this statute.

Statement of the Case.

The nub of this case is that petitioner, Esso, has pegged the resale price of its gasoline to ultimate consumers at 20.9 cents per gallon and insists that the respondent, a non-signer, observe that price, notwithstanding that petitioner itself sells to ultimate consumers at 16.1 to 17.1 cents per gallon (R. 33, 34).

The respondent is unable to adopt the petitioner's statement of the case (Petition, pp. 3-6) except as stated hereinafter, for the reason that, in addition to certain self-serving characterizations,* the petitioner's statement is in material respects contradicted by the record.†

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*Throughout the petition the petitioner characterizes itself as a "producer-wholesaler" or a "wholesaler," engaged in "wholesale" marketing in contrast with the respondent, characterized as a "retailer" making "retail" sales (Petition, pp. 3, 4, 7, 8, 9, 10, 12). These euphemisms are self-serving, and seem designed to beg the question of the case by studied repetition of "categories and labels." Cf. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, at 312, 313. The majority of the Court of Appeals never used these characterizations (Petition, pp. 14-23), and the concurring opinion classes petitioner as a "retailer" (Petition, p. 29). The District Court, Wyzanski, D.J., addressing petitioner's counsel, R. 130, said: "You have tried to persuade me the plaintiff is engaged in the wholesale business. *I have never accepted that contention. . . .*"

†See Appendix, *infra*, p. 11.

The petitioner, Esso, is a Delaware corporation, engaged in refining and marketing petroleum products. In the words of Mr. Justice Woodbury, "the plaintiff-appellant not only supplies its gasolines to its retail dealers who in turn sell to ultimate consumers at their filling stations, but it also sells direct to some ultimate customers" (Petition, p. 18). More than 10% of its gasoline sales in Massachusetts in 1955 were to ultimate consumers (R. 94, 103; Petition, p. 4). There is no set minimum size or volume below which petitioner will not sell to such accounts; petitioner will sell to ultimate consumers wherever it will make a profit (R. 35). In fact, in 1955, petitioner's sales to consumer accounts using less than 5000 gallons per annum ($77,561) exceeded its sales to accounts using 20,000-25,000 gallons ($71,851.25) (R. 103; Petition, pp. 31, 32). The petitioner has salesmen constantly soliciting consumer accounts (R. 45). The actual breakdown of petitioner's Massachusetts accounts shows 984 service station accounts and 455 direct consumer accounts (R. 26 and 94).

The respondent, a Massachusetts corporation, operates two gasoline stations, considered large in metropolitan Boston, with a combined annual sales volume in 1955 exceeding 2,500,000 gallons of Esso gasoline (R. 86, 100). In 1955 respondent had 46 accounts purchasing in excess of 5000 gallons per annum, including one account purchasing 42,000 gallons per annum (R. 97). The 46 accounts consuming in excess of 5000 gallons per annum constituted more than 25% of respondent's business (R. 86 and 97).

The petitioner, the respondent, and other Esso dealers, all sell Esso gasoline directly to operators of fleets of vehicles, and to comparable accounts (R. 45, 50, 80, 88, 89, 96, 97, 98). In every area where the petitioner has a consumer account to which it sells gasoline there exists an Esso dealer (R. 94). The parties to this case are in actual competition for customers consuming annually

amounts of Esso gasoline ranging from less than 5000 gallons (R. 103) to in excess of 40,000 gallons (R. 97, 98).

The Court of Appeals on these facts held:

> ". . . there is most certainly an area in which the plaintiff and the defendant are in competition with each other. While their competitive techniques are different, one gives less service for a lower price and the other more service for a higher price, the fact remains that each in its own way is striving for the business of supplying gasoline directly to those who operate fleets of motor vehicles." (Petition, p. 19.)

> ". . . The parties before us on this appeal, as we have shown, are in a real sense competing with each other for the business of a not insubstantial class or type of consumers of gasoline. Although their techniques of doing business differ, they are nonetheless competitors, and this excludes application of the exemption from antitrust legislation." (Petition, p. 22.)

Argument.

Certiorari should be Denied.

1. So Long as a Seller is in Substantial Competition with a Buyer of his Commodity, he Cannot Legally Fix the Resale Price of That Commodity.

Petitioner originally sought to enjoin respondent from selling any of its gasoline at less than the resale price fixed by petitioner. Judge Wyzanski refused to grant the injunction when it appeared upon the trial that petitioner was in competition with respondent for a substantial volume of accounts.

Petitioner then modified its request by asking the trial court to enjoin respondent only as to those sales for which petitioner allegedly did not compete. Judge Wyzanski declined to entertain this request, saying that he would leave the case where it stood for the Court of Appeals; but the record is clear that, in his opinion, to grant such relief would permit petitioner to establish a state-wide minimum price and then undercut that price for such business as petitioner might choose (Petition, p. 33; R. 124).

Petitioner fared no better in the Court of Appeals, which unanimously sustained the trial court.

Petitioner now applies to this Court, in form at least, for the whole relief which it sought in the trial court. The bait that it casts to excite the interest of this Court is the theme (1) that the sales which it makes to ultimate consumers are in fact distinguishable and separable from the bulk of the sales made by respondent to consumers, and (2) that the McGuire Act should be interpreted to permit petitioner to compete in price when it chooses to sell to an ultimate consumer and to freeze the price when it does not.

Respondent submits that this argument has no basis in fact or in law, and that, if the argument were adopted, petitioner could fix a state-wide price for the sale of its gasoline, and then sell under that price to selected consumers. In fact, that is precisely what petitioner has been doing, even installing and maintaining storage tanks and pumps for such customers in order to secure their patronage (R. 34, 45, 46, 87).

The record establishes that petitioner sells to consumer accounts, which its salesmen solicit, at 16.1 to 17.1 cents per gallon (R. 34). Respondent sells at 18.9 cents (R. 5). Within this range respondent can successfully compete by offsetting the higher price by greater service (Petition, p.

19). One of petitioner's principal objects in the present proceeding is to eliminate this competition on respondent's part by requiring respondent to charge 20.9 cents on such sales (R. 33).

To support its argument on the facts, petitioner speaks of "potential" competition. The trial and appellate courts found actual and substantial competition (Petition, pp. 19, 22, 33). The petitioner claims that as to "the great bulk of respondent-retailer's business . . . there was concededly no competition" (Petition, p. 10). No such concession was made, and the record, to the contrary, bears out the finding that competition between the parties was substantial. Both parties engage heavily in sales to customers consuming less than 5000 gallons a year (R. 103; Petition, pp. 31, 32); and both engage heavily in sales to customers consuming in excess of 5000 gallons a year (R. 96-97).*

Petitioner's attempt, of course, is to persuade this Court that petitioner is a wholesaler and that respondent is a retailer. Rejecting this argument, Judge Wyzanski said: "You have tried to persuade me the plaintiff is engaged in the wholesale business. I have never accepted that contention . . ." (R. 130).

Regardless of labels, whenever petitioner sells to an ultimate consumer, it competes with respondent, either actually or potentially, and every one of such sales which satisfies the need of an ultimate consumer deprives respondent of an actual or potential customer at its pumps.

To support its argument on the law petitioner contends that the lower courts have interpreted section 5 of the McGuire Act in a way which (*a*) defeats the intent of Con-

*Petitioner's statement that respondent's "average sale" is 7½ gallons (Petition, p. 4, footnote 3) has no support in the record, but is derived from average "typical" gasoline stations, size and location unspecified (R. 84, 85).

gress, (*b*) conflicts with this Court's decision in *McKesson* and (*c*) conflicts, as well, with the decision of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665. None of these arguments will stand analysis.

(*a*) *There is no conflict with the expressed intent of Congress.*

In *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, this Court held that price fixing had been exempted from the anti-trust laws only as between parties to "fair trade" contracts, and that it could not be enforced against nonsigners. Congress was thereupon persuaded to pass the McGuire Act amending section 5 of the Federal Trade Commission Act so as to make "fair trade" contracts binding upon non-signers as well as upon those who expressly consented to be bound. This is the function of section (3) of the McGuire Act.

Petitioner would have this Court believe that by the McGuire Act, Congress intended to permit petitioner to enter into a "fair trade" contract with one dealer, and then use that contract to tie the hands of another, while at the same time competing with that other for a substantial volume of business by undercutting the price so established.

There is no justification for the belief that Congress intended to go to such lengths. The scheme of the McGuire Act is clear, and it can be enforced without giving rise to any such distortion of purpose: section (2) exempts "fair trade" contracts from the anti-trust laws; section (3) makes such contracts binding on non-signers; section (4) copper-rivets the exemption not only as to the making but

as to the enforcement of the contracts; and section (5), in order to preserve competition, states that the contracts in question shall not be exempt if they are "between persons, firms, or corporations in competition with each other."

When section (3) speaks of "such contracts" as being enforceable against non-signers, it refers to contracts specified in section (2), and of course it can only mean contracts valid under section (2). Contracts "between persons, firms or corporations in competition with each other" are outlawed by section (5), and hence are not validated by section (2) or enforceable against non-signers under section (3).

It follows that, if petitioner had entered into a "fair trade" contract with respondent, the contract would be illegal and unenforceable as one "between persons, firms or corporations in competition with each other." Petitioner's contention is that the contract should nevertheless be enforceable against respondent because it was not signed by respondent. Petitioner's argument, in final analysis, is that Congress intended, by passing the McGuire Act, to bind non-signers by contracts which would have been illegal and unenforceable if they had signed them. This is manifestly absurd.

(*b*) *There is no conflict with the opinion of this Court.*

In *McKesson* this Court held that a manufacturing pharmaceutical house could not fix its prices at wholesale under fair trade agreements with wholesalers while at the same time engaging itself in wholesaling operations.

Petitioner points out that the contracts in *McKesson* were between competing wholesalers and therefore effected so-called "horizontal" price fixing which does not share the exemption accorded to "vertical" price fixing by the McGuire Act. It does not at all follow, as peti-

tioner argues, that by outlawing the McKesson contracts this Court sanctioned the Esso contracts. In the case at bar, as in *McKesson*, the petitioner and the respondent are directly competing for the same customer—in this case the ultimate consumer; and in *McKesson* this Court said, referring to the final clause of section 5 of the McGuire Act:

> "Congress thus made as plain as words can make it that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices."

Far from conflicting with *McKesson*, the holding of the lower courts in the case at bar is founded on and supported by *McKesson* (Petition, pp. 20-21).

(c) *There is no conflict here with the Supreme Judicial Court of Massachusetts.*

In *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, the Supreme Judicial Court of Massachusetts held that the sales there in question were merely incidental and accessory to the manufacturing business of the General Electric Company. In the case at bar the sales came to $3,345,702.28 (R. 103, Exh. 2), constituted 10% of the petitioner's business (R. 94 and 103) and were made to approximately one-third of petitioner's accounts in Massachusetts (R. 26 and 94). Petitioner employed salesmen constantly to solicit such accounts (R. 45). There was nothing either incidental or accessory about them.

The conflict which petitioner suggests between the case at bar and the *Kimball* case is therefore not supported by the *Kimball* opinion.

2. No Issue which Warrants the Granting of Certiorari is Presented by the Petition.

Petitioner concludes its argument by asserting that "the decision of the court below means that it is impossible for the petitioner to avail itself of the fair trade laws of the Commonwealth of Massachusetts" and suggests that the same consequence will ensue for other fair traders (Petition, pp. 11-12).

We respectfully disagree. In the first place, it is not true that petitioner cannot "avail itself of the fair trade laws of the Commonwealth of Massachusetts." "Fair trade" presents an exception to the anti-trust rule against price fixing. If petitioner wishes to avail itself of the exception, it need only abide by the rules and withdraw from competition with its own Massachusetts dealers.

In the second place, we are dealing here with facts, not theory; the case having been tried on the merits, the trial court found as a fact that the parties were in substantial competition for the same accounts. There is nothing in the record to support the suggestion that the same facts obtain in the case of other "fair traders."

Conclusion.

The petition should be dismissed.

Respectfully submitted,

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Attorneys for Respondent.

Appendix.

1. Petitioner defines "commercial account" as "a business concern which has its own gasoline storage tanks and pumps and buys gasoline in tank-wagon quantities" (Petition, p. 4). Petitioner does not cite the record for this definition. The record shows that petitioner has two "types of accounts, dealer and commercial," and that a "commercial account" is nothing more than a consumer rather than a dealer buying direct from petitioner (R. 32). The record shows that in many cases where such accounts do not "have their own" tanks and pumps the petitioner supplies and maintains such equipment, at its own expense (R. 34, 45, 46, 87), and the Court of Appeals so found (Petition, p. 18), and that, in those cases where consumer accounts do have tanks and pumps, that equipment belonged to the previous supplier, and is transferred to the ownership of the petitioner (R. 46). The record shows that such accounts do not buy in "tank-wagon quantities," if this phrase means whole tank wagons at a time (3500 to 6000 gallons, R. 83), but in fact take deliveries in quantities as small as 100 gallons (R. 33).

2. Petitioner states that the "size of transactions" of the respondent is limited by the size of the fuel tank into which gasoline is pumped, implying that respondent cannot make a sale larger than the capacity of a single vehicle or tank (Petition, p. 4). The record does not support this; respondent obviously may make one sale to several vehicles as part of a "fleet" (R. 96, 97).

3. Petitioner states that its "Fair Trade" agreements were "valid under said Act," referring to the Massachusetts Fair Trade Act (Petition, p. 4). The record shows that respondent agreed that petitioner acted "pursuant" to the Massachusetts Act in entering the agreements, and

that the agreements were in effect (R. 19), but there is no stipulation or finding of "validity."

4. Petitioner states that it makes deliveries into "tank wagons of its customers" (Petition, p. 4). The record contains no evidence whatsoever of any customers owning or having any tank wagons.

5. Petitioner states that the "court below affirmed the ruling of the District Court that petitioner was in potential competition with respondent for fleet accounts" (Petition, p. 5). An accurate statement of the actual ruling of the Court of Appeals is, in the Court's own words: "Thus, as the District Court found, there is most certainly an area in which the plaintiff and the defendant are in competition with each other" (Petition, p. 19).

6. Petitioner implies that the Court of Appeals "also" ruled that there was a "separable . . . portion of respondent's sales as to which there was no competition between the parties" (Petition, p. 5). The Court made no such ruling or finding, but merely dealt with such a *contention* by the petitioner (Petition, p. 22).

7. Petitioner makes the statement that, when the District Court found "potential" competition between these parties, the word "potential" meant that one of respondent's customers, *"by providing himself with the necessary facilities,"* could become a customer of the petitioner (Petition, p. 9). If there is any fact clearly established in the record and in the opinion of the Court of Appeals, it is that the petitioner supplies these facilities where necessary and at its expense (R. 34, 45, 46, 87; Petition, p. 18), and, where these facilities already exist, they are transferred from the ownership of the former supplier to the ownership of the petitioner (R. 46).

8. Petitioner states that respondent defines "fleet account" as a customer making aggregate annual purchases

in excess of 5000 gallons (Petition, p. 4). This statement is not superficially supported by the record, wherein respondent testified to forty-six accounts purchasing in excess of 5000 gallons annually, and stated that respondent had forty-five "fleet accounts" (R. 97). But if the effort of petitioner's statement is to make the whole record define "fleet accounts" as accounts purchasing in excess of 5000 gallons annually, then petitioner's own evidence in the record shows this is not true. Petitioner's definition of its own "commercial accounts" includes the following: "A commercial account is *a trucking account primarily* . . ." (R. 32); "Commercial accounts include . . . *truckers, fleet operators* . . . and taxi-cab accounts" (R. 80). And petitioner admits that it sells to such accounts in volumes less than 5000 gallons per year, and that such sales exceed those to 20,000 gallon accounts (R. 103; see Petition, pp. 31, 32).